SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1225

ROADWAY EXPRESS, INC.,

Appellant,

vs.

DIRECTOR, DIVISION OF TAXATION,

Appellee.

On Appeal from the New Jersey Supreme Court

BRIEF OPPOSING MOTION TO DISMISS AND/OR AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS AND/OR AFFIRM

Appellee's motion to dismiss and/or affirm tacitly concedes that the instant appeal squarely falls within the scope of 28 U.S.C. Sec. 1257(2). The motion is grounded, however, on the proposition that the constitutional issues presented are so unsubstantial as not to require further argument. The motion is not well grounded. The questions are substantial and properly deserve the full consideration of this Court.

Appellee, in Point I of its brief, following the example of the learned court below, undertakes to analyze certain

decisions of this court in order to show that the Wave of the Future is to uphold this particular instance of state taxation notwithstanding the Commerce Clause, since interstate commerce must pay its own way. This technique is an old one, but it has proved unsuccessful enough times that it cannot safely be accepted as a method of demonstrating a lack of substance of the constitutional issues raised by this appeal.

The Second Circuit Court of Appeals in *Spector Motor Service* v. *Walsh*, 139 F. 2d 809, 814-818 (1944), and in *Spector Motor Service* v. *O'Connor*, 181 F. 2d 150, 153-156 (1950) upheld the constitutionality of the state corporate franchise tax by such a technique only to be ultimately reversed by this Court on appeal from the last cited opinion, at 340 U. S. 602 (1951).

The same method was employed by the state court in *Nippert* v. *City of Richmond*, 183 Va. 689, 33 S. E. 2d 206 (1945), only to be rejected by this Court in *Nippert* v. *Richmond*, 327 U. S. 416, 420-423 (1946), and in *Calvert* v. *Panhandle Eastern Pipeline Company*, 255 S. W. 2d 535 (Tex. Civil Appeals 1935), only to be reversed in *Michigan-Wisconsin Pipeline* v. *Calvert*, 347 U. S. 157 (1954).

Counsel's argument along similar lines was rejected by this Court in *Joseph* v. *Carter & Weekes*, 330 U. S. 422, 425-433 (1937).

In any event, the long standing rule that interstate commerce must pay its own way, *Postal Telegraph-Cable Company* v. *Richmond*, 249 U. S. 252, 259 (1919), does not mean that constitutional limitations are obsolete or that any and every form of state taxation on interstate commerce is permissible. Instead, this Court has carefully adhered to the view that the Commerce Clause, even today, forbids certain forms of state taxation, *Freeman* v. *Hewit*, 329 U. S. 249, 253 (1946); *National Bellas Hess* v. *Department of Revenue*, 386 U. S. 753 (1967).

Moreover, the cases in this Court relied upon by appellee, when properly analyzed, are distinguishable from the case at bar and do not support the conclusion that *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, has been impliedly overruled, or that the imposition of the tax in question upon appellant is clearly free from constitutional doubts.

Spector, of course, held that the Commerce Clause forbids a state franchise tax upon the privilege of doing business, when levied upon a foreign corporation engaged solely in interstate commerce.

Railway Express Agency v. *Virginia*, 347 U. S. 359 (1954) held unconstitutional an annual license tax levied upon gross receipts, for the privilege of doing business in the state where the taxpayer was a foreign corporation engaged solely in interstate commerce.

Railway Express Agency v. *Virginia*, 358 U. S. 434 (1959) upheld as valid a "franchise" tax measured by gross receipts derived from operations within the state. It is important to note that this tax was sustained on the ground that it was not a franchise tax on the privilege of doing business within the state, but was a property tax. The opinion of the Supreme Court of Appeals of Virginia in this case, reported at 199 Va. 589, 100 S. E. 2d 785, makes it clear that the tax was a property tax and not an excise upon the privilege of doing business, 100 S. E. 2d 789-791, 795. The issue was stated in this Court's opinion at 358 U. S. 439, as follows: "Our sole question under the Commerce Clause is whether the tax in practical operation is on property or on privilege." The tax was upheld because it was concluded to be a tax on property; this was emphasized in the concurring opinion of Mr. Justice Brennan, 358 U. S. 446-448.

Northwestern Cement Company v. *Minnesota*, 358 U. S. 450 (1959) upheld the constitutionality of a state net income tax imposed upon that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing state when those activities are exclusively in furtherance of interstate commerce. The court's opinion distinguished the issues before it from other situations and expressly stated, at p. 548: "Moreover, it is beyond dispute that a state may not lay a tax on the 'privilege' of engaging in interstate commerce, *Spector Motor Service* v. *O'Gonnor*, 340 U. S. 602 (1951)." Certainly, the *Northwest Cement* case furnishes absolutely no basis for concluding that the *Spector* case is no longer authoritative.

General Motors Corp. v. *Washington*, 377 U. S. 436 (1964) did not deal with the imposition of a state franchise tax on a foreign corporation engaged *exclusively* in interstate commerce, but it involved such a tax upon a foreign corporation engaged partly in intrastate and partly in interstate commerce. Thus, this case is in the line of authority illustrated by such cases as *International Shoe Company* v. *Shartell*, 279 U. S. 429, 433 (1929) and *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S. (1937). The particular significance of *General Motors Corp.* v. *Washngton* lies in its insistence that the taxpayer sustain the burden of proving the relative amount of intrastate as opposed to interstate commerce that it did within the taxing state; see 377 U. S. at 448, 449.

The New Jersey Supreme Court, in the opinion below, conceded that a franchise tax "on an exclusively interstate business based solely on the privilege of doing such business in the state is constitutionally forbidden." 50 N. J. 492, 236 A. 2d 588. This, of course, is the rule of *Spector*. The court concluded that the New Jersey tax, by virtue of

the statutory language employed, is imposed upon something other than "doing interstate business." It conceded, however, that this was a question never passed upon by this Court. Thus, the court below stated, at 50 N. J. 485, 236 A. 2d 584:

> "Constitutional propriety is not to be determined by labels or semantics, but rather by the operating incidence of the particular levy, while a tax basis worded as is New Jersey's has never been passed upon by the nation's highest court, we earnestly believe that the current course of its opinions in the field, as we read them, points to the conclusion that this levy is valid as applied to exclusively interstate business."

Surely a constitutional question, which has admittedly never been passed upon by this Court, presents a question of substance calling for the noting of probable jurisdiction.

Appellee's motion should be denied.

Respectfully submitted,

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